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IN THE

Supreme Court of the United States

October Term, 1965

No. 241

SIMEON A. BURNETTE, ET AL.,
Appellants,

v.

LEVIN NOCK DAVIS, ET AL.,
Appellees.

Appeal From The United States District Court For The Eastern District of Virginia

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
Preliminary Statement	1
Prior Proceedings	2
Statement of Facts	3
The Statutes Involved	4
Question Presented	4
Argument	4
I. The Statutes In Question Do Not Deny The Henrico Plaintiff-Interveners The Equal Protection Of The Laws Under The Fourteenth Amendment To The Constitution Of The United States	4
Conclusion	13

TABLE OF CITATIONS

Cases

Bailey v. Patterson, 369 U. S. 31, 33	13
Fortson v. Dorsey, 379 U. S. 433	9
Mann v. Davis, 213 F. Supp. 577, aff'd. sub. nom. Davis v. Mann, 377 U. S. 678	2
Reynolds v. Sims, 377 U. S. 533, 577	9, 11

Other Authorities

Page

Acts of Assembly, Extra Session (1964):
Chapters 1 and 2 ..... 3, 4

Code of Virginia (1950) as amended:
Section 24-12 ..... 2, 3
Section 24-14 ..... 2, 3

Virginia Constitution (1902):
Section 43 2

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PRELIMINARY STATEMENT

On June 10, 1965, appellants forwarded to this Court their jurisdictional statement supplementing their appeal from a final order of the United States District Court for the Eastern District of Virginia dismissing appellants' petition and complaint in intervention in this litigation. The appellees, believing that the matters set forth herein will demonstrate the lack of substance in the question sought to be presented by such appeal, file this statement in opposition to appellants' jurisdictional statement and include their motion to affirm the judgment of the court below upon the ground that the

question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On June 15, 1964, this Court affirmed the judgment order which the three-judge district court below had entered on November 28, 1962, declaring invalid under the Equal Protection Clause of the Fourteenth Amendment two statutes enacted by the General Assembly of Virginia decennially reapportioning the House of Delegates and Senate of Virginia as required by Section 43 of the Constitution of Virginia (1902). See, Sections 24-12 and 24-14, Code of Virginia (1950) as amended. *Mann* v. *Davis,* 213 F. Supp. 577, *aff'd. sub. nom. Davis* v. *Mann,* 377 U.S. 678.

Upon remand, the district court entered its further order of September 18, 1964, reaffirming its prior order but staying enforcement thereof until December 15, 1964, to afford the General Assembly of Virginia ample time (1) to enact constitutionally valid reapportionment statutes for both houses of the General Assembly and (2) to effectuate such statutes by providing for the election of members of both houses from the districts of the State as thus reapportioned.

On November 30, 1964, the General Assembly of Virginia convened in special session and enacted such reapportionment statutes by amending and reenacting Sections 24-12 and 24-14 of the Virginia Code. See, Chapters 1 and 2, Acts of Assembly, Extra Session, 1964. These amendments were approved by the Governor of Virginia on December 2, 1964, and became effective March 13, 1965.

On December 17, 1964, certain citizens of Henrico County and of the city of Richmond (hereafter referred to as Henrico plaintiff-interveners and Richmond plaintiff-interveners) filed their separate petitions for leave to intervene in this

litigation and to file their respective complaints in intervention attacking the validity of the amended reapportionment statutes. By orders entered December 23 and December 30, 1964, the district court permitted such intervention and scheduled the filing of pleadings, exhibits, lists of witnesses and briefs. On March 10, 1965, the cause was heard on the merits, and on April 9, 1965, the district court filed its opinion and final order dismissing the instant appellants' petition and complaint in intervention and striking the case from the docket. The opinion and order of the district court are set out in Appendix A and Appendix B, respectively, of this statement.

STATEMENT OF FACTS

Chapter 2, Acts of Assembly, Extra Session, 1964, amended and reenacted Section 24-12 of the Virginia Code and apportioned the House of Delegates of Virginia into 63 districts. Under this enactment, the county of Henrico and the city of Richmond comprise the Thirty-Sixth district, represented by 8 delegates. The district so created contains a total population of 337,297 according to the 1960 census, which population gives rise to a representative ratio of 42,162 persons for each of the district's 8 delegates. With a total State population of 3,966,949, each of the 100 delegates in the lower house of the Virginia General Assembly would presumably represent 39,669 persons.

Chapter 1, Acts of Assembly, Extra Session, 1964, amended and reenacted Section 24-14 of the Virginia Code and apportioned the Senate of Virginia into 33 districts. Under this enactment, the county of Henrico comprises the 31st senatorial district, represented by 1 Senator, and the city of Richmond comprises the 30th senatorial district, represented by 2 Senators. Henrico County has a total population

of 117,339 and the city of Richmond has a total population of 219,958, according to the 1960 census. These population figures give rise to a senatorial representative ratio of 117,339 persons for Henrico County's 1 Senator and 109,979 persons for each of the city of Richmond's 2 Senators. With the total State population of 3,966,949, each of the 40 Senators in the upper house of the General Assembly of Virginia would presumably represent 99,174 persons.

THE STATUTES INVOLVED

Under attack in these proceedings are Chapters 1 and 2, Acts of Assembly, Extra Session, 1964, which respectively divide the Senate and House of Delegates of the General Assembly of Virginia into 33 senatorial and 63 house districts. As the statutes in question are somewhat extensive, they have been set out in full in the appendix to this statement. See, Appendix C, *post*.

QUESTION PRESENTED

Do Chapters 1 and 2, Acts of Assembly, Extra Session, 1964, deny the Henrico plaintiff-interveners, and other persons similarly situated, the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

I.

The Statutes In Question Do Not Deny The Henrico Plaintiff-Interveners The Equal Protection Of The Laws Under The Fourteenth Amendment To The Constitution Of The United States.

In considering the question sought to be presented by the instant appeal, it is important to identify at the outset the

precise nature of the complaint put forward by the appellants (Henrico plaintiff-interveners) in the court below. This is easily and conclusively established by reference to the initial paragraph of that portion of the district court's opinion which relates to the Henrico plaintiff-interveners' petition and complaint. In this connection, the district court declared (Appendix A, App. 2):

> "The grievance asserted by these intervenors is that Henrico County and Richmond were placed in a single district, No. 36, for representation in the House of Delegates, rather than each made an independent district. Combined, these two political subdivisions were given 8 delegates, *but Henrico pleads for 3 delegates of its own, leaving the remaining 5 to Richmond. The injury from the consolidation, according to the county, is that as Richmond has a voting power greater than Henrico, the city will be able to elect all 8 delegates and Henrico will have no representation by its own citizens.*" (Italics supplied.)

Proceeding to consider this contention in the factual context in which it was made, the district court noted (Appendix A, App. 2-3):

> "Ideal representation in the House of Delegates, when Virginia's total population according to the 1960 census is distributed among its 100 delegates, is 39,669 persons for each member. Richmond had a population of 219,958, Henrico 117,339. Applying these figures, it appears that Henrico would be entitled to 2 delegates and wanting but 3,668 residents for a third. *Richmond alone could justify 5 delegates, with 21,613 towards a sixth.* To have awarded only 5 delegates to Richmond would have meant that each of its delegates represented 43,911, or 4,242 persons in excess of the norm. *With Henrico not quite earning 3 delegates, but Richmond*

> *due more than 5,* the solution of the Virginia Assembly was to give the two areas 8 delegates jointly. There would then be 42,164 persons per delegate, a representation fairly nearing the par of 39,669." (Italics supplied.)

In light of the foregoing summary, it is manifest that *if the population of Henrico County alone* were to be considered, the General Assembly of Virginia would have been justified in apportioning three delegates to that county, even though the county would have been 3,668 residents short of a full ratio for the third delegate. Such an allocation, however, would have left only five delegates to be awarded to the city of Richmond, despite the fact that the population of the city was sufficient to justify not only five full delegates, but also supply more than half the ratio (21,613/39,669) for a sixth delegate. In this setting, the action of the General Assembly in combining the county and city into one district and allotting that district eight delegates jointly had the effect of (1) balancing off the deficiency in the county's population and the overage in the city's population and (2) more nearly approaching the constitutional standard of "one person, one vote" than would have been the case if Henrico County had been allotted three delegates separately and the city of Richmond five delegates separately.

Moreover, as pointed out by the court below, additional relevant considerations buttressed the General Assembly's decision to combine the county and city into one district. In this connection, the district court observed (Appendix A, App. 4):

> "Physical factors could reliably have directed the judgment of the General Assembly in determining upon the union of Richmond and Henrico. They form a compact and contiguous territory. If they may not agree

> politically, concededly their interests are interknit and common in many aspects. The county is the residence of hundreds of business, professional and otherwise occupied persons plying their callings in the city. In fact, while the two are distinct governmental units, the courthouse of the county is situate well within the city's corporate limits. At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the Constitutional standard of weight and fineness, 'one person, one vote'."

Confirming these observations of the district court were the circumstances—fully documented of record—surrounding the annexation proceedings involving the city of Richmond and Henrico County which were being prosecuted when the challenged apportionment statutes were enacted. At that time, there were pending in the Circuit Court of Henrico County annexation proceedings through which the city of Richmond sought to annex some 152 of the 232 square miles comprising Henrico County. Indirectly, these proceedings had their inception in a resolution of the Board of Supervisors of Henrico County, dated July 28, 1960, in which the governing body of the county expressed its willingness to negotiate with the city council of Richmond for the purpose of determining whether or not a mutually agreeable and satisfactory plan could be developed for the consolidation of the county of Henrico and the city of Richmond into a single city of the first class. A similar resolution was subsequently adopted by the city council of the city of Richmond on August 15, 1960.

When no plan of consolidation acceptable to the citizens of both political subdivisions was forthcoming, the city of Richmond filed its original annexation proceedings on December 27, 1961. Thereafter, on April 27 and July 31, 1964, respectively, the Circuit Court of Henrico County rendered

its opinion and entered its interlocutory order decreeing that the necessity for and expediency of annexing certain areas in Henrico County to the city of Richmond existed and allowing annexation by the city (under certain conditions) of some 17 square miles of Henrico County containing a population of some 45,000 persons. No sum representing the amount which the city would be required to compensate the county in respect of such annexation had been fixed by the annexation court when the General Assembly of Virginia convened in special session on November 30, 1964, nor had the city of Richmond indicated whether it would accept or reject the annexation terms, or appeal the decision of the Circuit Court of Henrico County to the Supreme Court of Appeals of Virginia.

Under these circumstances, the General Assembly was confronted with a wide range of conflicting possibilities which involved the capital city of the Commonwealth and depended upon the outcome of the pending annexation litigation. If the city of Richmond should reject the annexation terms, the population of Henrico County would justify allocating to it three seats in the House of Delegates. If the city of Richmond should accept the annexation terms, the population of Henrico County would be reduced by some 45,000 inhabitants and the remaining population of the county would be sufficient to justify allocating the county only two delegates. If the city of Richmond should appeal the annexation court's decision, the possible consequences would be multiple and uncertain, with final determination of these consequences possibly postponed for an indefinite number of years. Lacking clairvoyance, the General Assembly of Virginia could not possibly have known—when the challenged statutes were enacted—what the final disposition of the above-described annexation activities would

be or what the populations of the county of Henrico or the city of Richmond would be.

In this setting, the General Assembly decided to apportion Henrico County one seat in the Senate of Virginia, thus assuring the citizens of the county (or what might remain of the county after annexation) an exclusive voice in the General Assembly regardless of the ultimate outcome of the annexation litigation. With respect to representation in the more populous branch of the legislature, the General Assembly decided to combine the areas in question into a multi-member district in which principle of population-based representation would be wholly uninfluenced by the pending annexation proceedings *regardless of the timing or character of their ultimate disposition*. By combining the county and the city into one district, the General Assembly insured that the constitutional principle of population-based representation in the House of Delegates could not possibly be affected by the culmination of the annexation activities.

This desirable result was achieved by establishing a multi-member district composed of the county and the city—a method of apportionment which had already received, and has since received, the express approbation of this Court. *Reynolds* v. *Sims*, 377 U. S. 533, 577; *Fortson* v. *Dorsey*, 379 U. S. 433. As the district court stated (Appendix A, App. 3):

> "A multi-member district, though linking more than one political subdivision, is not Constitutionally impermissible. *Fortson* v. *Dorsey, supra*, 379 U.S. 433 (1965). A multi-county or a county-city district is also legal. Id. But the possibility that a delegate or delegates may be chosen from one part of a district—whether a multi-county or a county-city district—rather than from another exposes no defect in the allotment. Id. In pass-

ing, it is at least noteworthy *that Henrico made no objection in 1962 when the reapportionment act gave Henrico 1 delegate and then assigned 8 delegates jointly to Richmond and Henrico. While this distribution was in effect in 1963, we are told that a number of the 8 winning candidates, although resident in Richmond, received more votes in Henrico than did the candidates from that county. This would seem to refute somewhat Henrico's insistence that its citizens prefer to have their delegates come from Henrico.*" (Italics supplied.)

The formation of the multi-member district here under consideration is not an isolated instance of such procedure in the challenged statutes. On the contrary, in apportioning representation in the Senate of Virginia, the General Assembly combined the city of Portsmouth, the city of Chesapeake (formerly South Norfolk and Norfolk County) and the city of Virginia Beach (formerly Virginia Beach and Princess Anne County) into one multi-member district and allotted that district 3 Senators. Portsmouth has a population of 114,773 residents, Chesapeake has a population of 73,647 residents and Virginia Beach has a population of 85,218 residents. With an ideal representative ratio of 99,174 persons per Senator, the population of Portsmouth was sufficient to have justified the General Assembly in allocating it one Senator separately. However, the governing constitutional standard of "one person, one vote" could more nearly be approached by balancing off the population overage of Portsmouth with the population deficiencies of Chesapeake and Virginia Beach by combining the three political subdivisions into one multi-member district with a resulting population per Senator ratio of one Senator for each 91,213 persons in the combined district.

In this connection, it is significant to note that while the population of the city of Portsmouth would have *justified*

the General Assembly in awarding it one Senator separately, it does not follow that Portsmouth was therefore constitutionally *entitled* to be awarded one Senator separately. Similarly, the fact that the General Assembly would have been justified in alloting Henrico County three delegates separately does not mean that Henrico County is constitutionally entitled to such an allotment. So long as the constitutional principle of population-based representation is faithfully reflected in an apportionment statute, the formation of multi-member districts rather than single-member districts infringes no individual or personal constitutional right of the citizens of any district. As this Court stated in *Reynolds* v. *Sims, supra,* at 579:

> "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. *Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" (Italics supplied.)

In light of the above-quoted language, it is manifest that the instant appellants' contention that Henrico County has a constitutional right to exclusive representation in the House of Delegates of Virginia by representatives who are responsible only to the citizens of Henrico County for their election is utterly without constitutional foundation. Nothing contained in any of the cases decided by this Court on July 15, 1964, and collectively styled *The Legislative Apportionment Cases*—or any other decision of this Court—lends even remote support for such a contention. As a consequence, counsel for these appellants attempted in the court

below—and are now attempting—to read into *The Legislative Apportionment Cases* additional constitutional requirements which those cases do not prescribe. The assertion that the Henrico plaintiff-interveners have a constitutional right (regardless of equality of district population) to exclusive representation in the House of Delegates of Virginia expresses merely the *political preference of the specific interveners in this litigation,* not a *constitutional right* of such interveners or of the citizenry of Henrico County—the class interveners represent.

When one considers the nature of the class which the instant appellants represent, it is apparent that their suggestion that the purpose and effect of the challenged consolidation "was to minimize and dilute the effectiveness of the growing Negro vote in the city of Richmond and the increasing Republican strength in Henrico County" is—so far as these appellants are concerned—sheer afterthought. See, Jurisdictional Statement, p. 18. Such a contention was indeed made in the court below by the Richmond plaintiff-interveners, representing a group of Negro citizens of the city of Richmond, and was found by the district court to be without merit. However, the Henrico plaintiff-interveners, appellants here, do not and cannot represent—nor have they ever purported to represent—either Republicans or the Republican Party or any Republican organization or Negroes or any Negro organization. On the contrary, it is manifest from their complaint in intervention and the opinion of the district court that the only class represented by these appellants is the citizenry of Henrico County at large. Thus, even if it could be suggested that the purpose and effect of the challenged consolidation was to minimize or dilute the effectiveness of a growing Negro or Republican vote in the city of Richmond or Henrico County, it is clear that these

appellants are utterly without legal standing to raise such an issue. Equally applicable to them with respect to such a contention is the observation of this Court in *Bailey* v. *Patterson,* 369 U.S. 31, 33:

> "They cannot represent a class of whom they are not a part."

CONCLUSION

After extensive consideration of the constitutional deficiencies alleged by the instant appellants to be present in the challenged reapportionment statutes, the district court declared (Appendix A, App. 2, 4, 8):

> ". . . Our examination of the record discloses no such trespasses or fouls.
>
> * * *
>
> "At all events, the Act does not in any degree devalue the vote in either Richmond or Henrico below the constitutional standard of weight and fineness, 'one person, one vote.'
>
> * * *
>
> "The record does not authorize attribution to the General Assembly of caprice or an unacceptable motive in the Henrico and Richmond reapportionment. To the contrary, a firm foundation may be seen for it."

Any impartial analysis of the statutes challenged in the case at bar discloses that they have been enacted in faithful compliance with the governing constitutional rule of population-base representation and that appellants, and all others similarly situated in the class they represent, are citizens and voters of a legislative district which has been formed in accordance with this constitutional mandate. Under such circumstances, the challenged enactments infringe no rights

guaranteed these appellants by the Equal Protection Clause of the Fourteenth Amendment. Counsel for appellees submit therefore that the question upon which the decision in this case depends is so unsubstantial as to obviate further argument and that the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellees in the above-captioned matter, hereby certify that copies of this Statement of Appellees Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first class postage prepaid, this 7th

day of July, 1965, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Edmund D. Campbell, Esq., Southern Building, Washington, D. C. and E. A. Pritchard, Esq., 106 North Payne Street, Fairfax, Virginia, Attorneys for plaintiff Harrison Mann, et al.; Aubrey L. Bowles, Jr., Esq., 901 Mutual Building, Richmond, Virginia, and L. Paul Byrne, Esq., 10 South 10th Street, Richmond, Virginia, Attorneys for Henrico plaintiff-interveners Simeon A. Burnette, et al.; S. W. Tucker, Esq. and Henry L. Marsh, III, 214 East Clay Street, Richmond, Virginia, Attorneys for Richmond plaintiff-interveners William S. Thornton, et al.; H. Ratcliffe Turner, Esq., Commonwealth's Attorney for Henrico County, 22nd and Main Streets, Richmond, Virginia, Attorney for defendants Helen D. Clevenger, et al.; T. Gray Haddon, Esq., Commonwealth's Attorney for the City of Richmond, City Hall, Richmond, Virginia, Attorney for defendants Thomas R. Miller, et al.; Henry E. Howell, Esq., 808 Maritime Tower, Norfolk, Virginia, Sidney H. Kelsey, Esq., 1408 Maritime Tower, Norfolk, Virginia, and Leonard B. Sachs, Esq., Citizens Bank Building, Norfolk, Virginia, Attorneys for plaintiff-interveners Charles L. Glanville, et al.; William J. Hassan, Esq., Commonwealth's Attorney for Arlington County, Court House, Arlington, Virginia, Attorney for defendants H. Bruce Green, et al.; Ralph G. Louk, Esq. and Quin S. Elson, Esq., Fairfax, Virginia, Attorneys for defendants Thomas P. Chapman, Jr., et al., and Alfred W. Whitehurst, Esq., Commonwealth's Attorney for the City of Norfolk, Norfolk, Virginia, Attorney for defendants William L. Prieur, Jr., et al.

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